

78-1527

Supreme Court, U. S.

FILED

MAR 7 1979

MICHAEL RODRIGUEZ, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

JUAN F. LUNA, A/B/O
ISAMELINA LUNA GONZALEZ, *Appellant*,

— v. —

SECRETARY OF HEALTH, EDUCATION
AND WELFARE, *Appellee*.

**Appeal From the United States Court of Appeals
for the First Circuit**

JURISDICTIONAL STATEMENT

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February, 1979

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IN THE
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OCTOBER TERM, 1979

No. 79-

JUAN F. LUNA, A/B/O
 ISAMELINA LUNA GONZALEZ, *Appellant*,

v.

SECRETARY OF HEALTH, EDUCATION
 AND WELFARE, *Appellee*.

Appeal From the United States Court of Appeals
 for the First Circuit

JURISDICTIONAL STATEMENT

Juan F. Luna, a/b/o Isamelina Luna González, the appellant appeals from the final judgment of The United States Court of Appeals for the First Circuit, dated November 7, 1978, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, holding

that 42 U.S.C.A. Section 402(d)(8)(D)(ii)(II), as applied in this case, is not constitutional as being violative of appellant's right of the equal protection guaranteed by the Fourteenth Amendment through the Fifth Amendment of the Constitution of the United States.

OPINION BELOW

The United States Court of Appeals for the First Circuit in a Memorandum and Order entered on October 4, 1978 affirming the judgment of the District Court for the District of Puerto Rico dismissing of the complaint. Not reported.

JURISDICTION

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the First Circuit entered on October 4, 1978. A motion for reconsideration was entertained and denied on November 7, 1978.

A supplementary notice of appeal to this Court was duly filed in the United States Court of Appeals for the First Circuit on December 7, 1978.

This appeal is being docketed in this Court within 90 days from the denial of a motion of reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1252.

QUESTION PRESENTED

Whether 42 U.S.C.A. Section 402(d)(8)(D)(ii) II is violative of the equal protection inherent in the due process clause guaranteed by the Fifth Amendment of the Constitution of the United States when applied to an adopted child; when the adoptant parent has been

receiving Social Security benefits for the previous two years and the adoptee is not a natural, step-child nor gran-child of the adoptant.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution:

"No person shall . . . nor be deprived of life liberty or property, without due process of Law"

The equal protection guarantee applies to the Federal government through the Fifth Amendment.

APPLICABLE LAW

Section 202(d)(1) of the Social Security Act (hereinafter "the Act"). 42 U.S.C. 402(d)(1) provides in pertinent part that:

(d)(1) Every child (as defined in section 216(e) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual if such child—

(A) has filed application for child's insurance benefits.

(B) at the time such application was filed was unmarried and

(i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or

(ii) is under a disability (as defined in section 223(d) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual has a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits

Section 202(d)(3) of the Act, 42 U.S.C. 402(d)(3) provides in pertinent part:

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

Section 202(d)(8) of the Act, 42 U.S.C. 402(d)(8) provides in pertinent part that:

(8) In the case of—

(A) an individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B) or

(B) an individual entitled to disability insurance benefits, or an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first

month for which he was entitled to old-age insurance benefits.

a child of such individual adopted after such individual became entitled to such old-age or disability insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)

(C) unless such child—

(C) is the natural child or individual (including such a child who was legally adopted by such individual), or

(D)(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within The United States,

(ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (A), for the year immediately before the month in which such individual became entitled to old-age insurance benefits of, if such individual had a period of disability which continued until he had become entitled to old-age insurance benefits the month in which such period of disability began, or (II) if he is an individual referred to in subparagraph (B), for the year immediately before the month in which began the period of disability of such individual which still exists at the time of adoption (or, if such child was adopted by such individual after such individual attained age 65 the period of disability of such individual which he attained age 65), or the month in which such individual became entitled to disability insurance benefits, or (III) if he is an individual referred to in either subparagraph (A) or subparagraph (B) and the child is the grandchild of such individual or his or her spouse, for the year immediately before the

month in which such child files his or her application for child's insurance benefits, and

(iii) had not attained the age of 18 before he began living with such individual.

In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child has lived with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of birth of such child.

Section 7 Article II, Constitution of Puerto Rico:

"... nor be deprived any person in Puerto Rico of the equal protection of Law"

Puerto Rico Adoption Law:

Law No. 86, dated June 15, 1953 (31 L.P.R.A. 531 et seq); the primary purpose of the law is to consider the adopted child for all legal purposes as a legitimate child of the adoptant.

STATEMENT OF THE CASE

The appellant, Juan F. Luna, a/b/o Isamelina Luna González, was entitled to Social Security Disability Insurance Benefits beginning with the month of February 1965 based upon an established onset date of July 16, 1964. The child, Isamelina, is the natural daughter of the appellant's wife's niece and she was born on July 18, 1967.

During the year 1971 the Adoption procedure was filed before the Superior Court, Caguas, Puerto Rico.

On August 10, 1971, the Department of Social Services received an Order from the Court for the necessary investigation according to the Adoption Law.

On January 18, 1972, the Department of Social Service sent a favorable report to the Honorable Court.

On October 2, 1973, the Honorable Court rendered its Resolution granting the adoption in favor of the appellant.

According to the Adoption Law of Puerto Rico and in order that the children do not know that they are adopted; a new birth certificate is issued with a register date of the day following the birth of the child.

On October 31, 1973 appellant filed an application for Child's Insurance Benefits, which was denied and also on reconsideration.

On August 30, 1976 a hearing was held and The Administrative Law Judge decided that the adopted child, Isamelina Luna González, is entitled to Child's Insurance Benefits effective September 6, 1973, the date the adoption was final.

On October 13, 1976 the Office of Program Operations, Social Security Administration, sent a memorandum to the Bureau of Hearings and Appeals whereat it is determined that the child, Isamelina, fails to meet the requirement for living with and one-half support under section 202(d) of the Social Security Act. See Appendix "F".

On March 15, 1977 the Appeals Council rendered its decision reversing the decision of the Administrative Law Judge and stating that the claimant is not entitled to child's insurance benefits as the adopted child of the wage earner.

On April 26, 1977 Appellant filed a complaint before the United States District Court for the District of Puerto Rico, challenging the Secretary's denial of child's insurance benefits under title II of the Social Security Act pursuant to 42 U.S.C.A. Section 405(g). Specifically, Appellant asserts that 42 U.S.C.A. Section 402(d)(8) is vague, an unlawful delegation of legislative and judicial powers to an Administrative agency and violative of the Fourteenth Article of the United States Constitution.

On March 30, 1978 the District Court rendered its decision that the complaint filed in this case shall be and is hereby dismissed.

THE QUESTION IS SUBSTANTIAL

Appellant submit that the actions, opinion and judgment present substantial questions warranting the acceptance of jurisdiction. The first substantial question is whether the District Court should have even entertained the action under the facts of this case.

It is clear that the District Court should take into consideration the Adoption Law of Puerto Rico, No. 86 (31 L.P.R.A. 531 et seq.) before dismissing the complaint. In Puerto Rico this Law at requires that the adopted children have the same inheritance rights as those legitimate children. Thus, endowing all children with equal right under the Law.

At the Administrative level no constitutional issue was raised because the Administrative Law Judge determined that the child was entitled to Child Insurance Benefits.

At the District Court the constitutional right of the child was rased, although not argued as it should

be it is well settled that while the Fourteenth Amendment is not applicable to the Federal Government because it prescribes only state action, concepts of equal protection are inherent in the due process of law guaranteed all citizens by the Fifth Amendment. *Bulluck v. Washington*, 468 F.2d 1096 (D.D.C.A., 1972). The equal protection guarantee applies to the Federal government through the Fifth Amendment. *Balton v. Harris*, 395 F.2d 642 (D.C.C.A., 1968).

The case of *Weinberger v. Salfi*, 422 U.S. 749 (1975) is misplaced.

We do not think that in the instant case, Appellant adopted the child, Isamelina, for the sole purpose of qualifying her for benefits. The term "abuse" is too generalized.

In Puerto Rico a case of Adoption goes through a lot of "red tapes". It is not so easy to obtain an adoption decree. First, the petition is filed under oath; second, the parents, if alive, under oath, has to accept that the child be adopted; third; the Court order the Department of Social Service, an investigation in regard to the conduct, moral, trait, economical condition and general circumstances of the future adoptant parents. (This investigation is conducted at the home, neighborhood and place of work or business of the future adoptant parents). The Department of Social Service (an agency, where most of the funds are from the Federal government and the Agency, who has a contract with the Social Security Administration to develop Social Security Disability Insurance benefits) has to submit a report to the Court stating if the future adoptant parents are acceptable as adoptive parents.

In the instant case on August 10, 1971 the case was referred to the Department of Social Services by the Superior Court. On January 18, 1972 a favorable report was submitted to the Court. On October 2, 1973 the Superior Court, Caguas, Puerto Rico decreed the adoption.

It should be noted that this procedure is lengthy and precise. Therefore making it almost impossible for committing abuse. It should also be considered that the State is a principal and responsible part of the adoption procedure.

Appellant have not been blessed with children.

Appellant's wife's niece came to live with them and she accepted that they adopted her child, Isamelina.

The Congressional concern to prevent abuses in the prophylactic rule in Section 402(d)(8) of the Social Security Act is reasonable; but it can't be understood that natural, step- or grand-child become qualified for benefits after their adoptant parent was receiving Social Security benefits for retirement or disability after two years while nieces and nephews do not qualify; although living under the same circumstances. *Damon v. Secretary of HEW*, 557 F.2d 31 (C.A.Vt., 1977).

If the child is living with Appellant since birth and they are supporting her, was she receiving one-half of her support from them? Or is it that as stated by the Law, these children do not have any right for Social Security benefits if the adoptant parent has been receiving benefits for two years? If so, then, there is a discrimination against those children as it violates the equal protection of the Law of the Fifth and Fourteenth Amendments of the Constitution of the United States.

We do not agree that the Social Security Act is a welfare program as it is based upon a compulsory contributions in order to qualify for benefits.

The explicit purpose of the Social Security system was to avoid the stigma of "Welfare".

In the case of the case of *White v. Mathews*, 559 F.2d 852 (2d Cir., 1977); cert. denied: No. 77-866, 46 Law Week 3539; the Court states:

"In providing for disability benefits, Congress intended to give a disabled worker a ready source of support, financed in part by a tax of his own earnings. (Slip. op. p.4730).

It is well-settled when a classification of a group occurred it might be discriminatory. What is the difference between a niece and a grand-child?

Why, then, should Appellant not be protected in his Fifth Amendment right of the equal protection of Law?

The source of Congressional power over the Commonwealth of Puerto Rico is the Compact between the United States and Puerto Rico (Public Law 600, dated July 3, 1950). *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663; reh. den. 417 U.S. 977.

The Commonwealth of Puerto Rico approve its own Constitution in consonance with the United States Constitution it was approved by Congress on July 3, 1952; thus in the Compact was established that all laws prior to the year 1952 when the Compact was ratified will continue in effect excepted those Federal Laws which Congress stated that will continue in force in Puerto Rico.

The Adoption Law of Puerto Rico, supra, was approved during the year 1902 from the Louisiana Civil Code when the United States Government established the civil government for Puerto Rico after the Spanish-American War.

The Constitution of Puerto Rico was ratified by the U.S. Congress and its Civil Right Charter, Article II states:

"Section 1 . . . that there be no discrimination because of . . . race, color, sex, birth place, origin or social condition. . . .

"Section 7 . . . nor shall equal protection of the law be denied to any person."

CONCLUSION

We believe that the questions submitted are truly substantial and present to this Court far reaching issues of the most vital public importance and should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

RAFAEL CARRERAS VALLE, Esq.
P.O. Box 20399
Río Piedras, Puerto Rico 00928
Counsel for Appellant
Phone (809) 767-5665

February, 1979

APPENDIX

1a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 9, 1979

Rafael Carreras Valle, Esq.
P.O. Box 20399
Rio Piedras, Puerto Rico 00928

RE: JUAN F. LUNA A/B/O ISAMELINA LUNA
GONZALEZ V. SEC. OF HEW

Dear Mr. Valle:

The statement as to jurisdiction in the above-entitled case is being returned due to the absence of the appendix required by this Court's Rules consisting of all lower court decisions as well as the notice of appeal.

In addition, the jurisdictional statement is not printed pur Rule 39 with regard to margin requirements.

Very truly yours,
MICHAEL RODAK, JR., Clerk

By
/s/ EDWARD C. SCHADE
Edward C. Schade
Assistant

2a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 25, 1979

Rafael Carreras Valle, Esquire
P.O. Box 20542
Rio Piedras, Puerto Rico 00928

RE: JUAN F. LUNA, a/b/o ISMELINA LUNA
GONZALEZ V. SECRETARY OF HEALTH,
EDUCATION AND WELFARE, A-660

Dear Mr. Valle:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Brennan who, on January 23, 1979, signed an order extending your time to and including March 7, 1979.

A copy of the Justice's order is enclosed.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By

/s/ FRANCIS J. LORSON
Francis J. Lorson
Deputy Clerk

3a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1265

JUAN F. LUNA a/b/o,
ISAMELINA LUNA GONZALEZ,
Plaintiff, Appellant,

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant, Appellee

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that JUAN F. LUNA, a/b/o, ISAMELINA LUNA GONZALEZ, the Plaintiff-Appellant above-named hereby appeals to the Supreme Court of the United States from the MEMORANDUM AND ORDER affirming the judgment of the District Court for the District of Puerto Rico dismissing of the complaint, entered in this action on November 7, 1978.

This appeal is taken pursuant to 28 U.S.C.A. Section 2101(c).

Río Piedras, Puerto Rico, December 7, 1978.

RAFAEL CARRERAS VALLE, Esq.
P.O. Box 20542
Río Piedras, Puerto Rico 00928
Counsel for Plaintiff-Appellant
Tel. 763-0414

Certificate of Service by Mail

I hereby certify that on this same date I forwarded a copy by mail of the foregoing Petition of Appeal, postage prepaid, to Alberto Tellechea, Esq., Asst. U.S. District Attorney, P.O. Box 3391, San Juan, P.R. 00904.

RAFAEL CARRERAS VALLE, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1265

JUAN F. LUNA a/b/o,
ISAMELINA LUNA GONZALEZ,
Plaintiff, Appellant,

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant, Appellee

Before COFFIN, *Chief Judge,*

CAMPBELL and BOWNES, *Circuit Judges.*

Memorandum and Order

Entered November 7, 1978

Appellant has moved for reconsideration of our summary affirmance of the district court's judgment. Our order addressed the only issue raised by the appellant in his brief: Whether a child adopted by an adult three years after the adult has been granted medical disability payments qualifies for benefits herself. Appellant's adopted child does not qualify for such payments. 42 U.S.C. § 402 (d)(8)(D)(ii)(II). In the motion for reconsideration, appellant raises a constitutional argument. We note that appellant raised a different and untenable constitutional argument before the district court and was rebuffed. Appellant now presents us with the bare bones of a colorable constitutional claim, citing inapplicable provisions of the constitution. We cannot consider this new claim. Federal Rules of Appellate Procedure 28(a)(2) and (4) mandate that a brief contain "a statement of the issues presented for review" and an argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities,

statutes, and parts of the record relied on." Where this is not done, an issue may be considered waived. *United States v. Edmonds*, 524 F.2d 62, 64 n.11 (D.C. Cir. 1975) More important, where a claim has not been argued below, we cannot hear it on appeal. *Molina Crespo v. Califano*, No. 78-1123 (1st Cir. Sept. 22, 1978). Finally, even if appellant's conclusory constitutional claims before the district court could be deemed to have preserved constitutional issues for appeal, we do not feel that appellant's arguments raise questions of sufficient gravity to warrant the extraordinary relief of reargument. *Cf. Consumer's Union of United States, Inc. v. F.P.C.*, 510 F.2d 656, 662 n.10 (9th Cir. 1974).

The motion for reconsideration is denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1265

JUAN F. LUNA a/b/o,
ISAMELINA LUNA GONZALEZ,
Plaintiff, Appellant,

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant, Appellee.

**Motion of Reconsideration and Memorandum of Law Incorporated
To THIS HONORABLE COURT:**

COMES NOW JUAN F. LUNA, a/b/o ISAMELINA LUNA GONZALEZ, and through his undersigned attorney alleges and prays:

1. That on October 10, 1978 Plaintiff-Appellant received MEMORANDUM AND ORDER dated October 4, 1978 from this Honorable Court.
2. That in accordance with the provisions of Local Rule 12, Social Security cases, the Court has determined that oral argument would not assist. Consequently the cases will be taken on submission on the briefs without oral argument.
3. It is well settled that Social Security cases are not adversary proceedings.
4. Pursuant to Rule 60(b); Rules of Civil Procedure and Rule 27; Rules of Appellate Procedure, Plaintiff-Appellant respectfully prays this Honorable Court that the Memorandum and Order dated October 4, 1978 be reconsidered for the following reasons:

a. It was an inadvertence that the appellant's brief did not identify the Secretary's denial, nor attempts to

rebut it because we were under the impression that as both; the Secretary and the District Court sustained the law; 42 U.S.C.A. Section 416(h)(3)(B)(II); that the only remedy was to try to prove the contrary; as we did.

b. In regard to the constitutional issue raised at the District Court which was not raised on appeal was again an inadvertence as we were under the impression that with our arguments it was inferred that there is a violation of the civil rights of the claimant, violation of the Equal Protection of Law, fourteen Amendment of the Constitution of the United States and Section 7, Article II, Constitution of the Commonwealth of Puerto Rico.

c. We sustained that Section 402(d)(8)(D)(i) and (ii) of the 42 U.S.C.A. discriminate against a particular group (e.g. adoptive children) if they are adopted while the adoptive parents were receiving Social Security Benefits. Nevertheless the adopted children in Puerto Rico are considered as a legitimate child of the adoptive parents.

d. The Law also discriminates against the adopted children as they are entitled to receive Social Security Benefits only if the adopted parent did and they have not attained age 18.

e. In the case of *Shapiro v. Thompson*, 394 U.S. 618 (1969) although for other reasons (welfare); the law was unconstitutional because it discriminates against an individual for denying the equal protection of the law. In Puerto Rico an adopted child is considered as a legitimate child and as such has all right and privileges including inheritance right. Thus a classification of this particular group is a violation of the equal protection of law.

f. In the case of *Dunn v. Blunstein*, 405 U.S. 330, (1972) the Court stated that the Law of Tennessee in relation to the time for registration to vote was unconstitutional because the law interferes with the fundamental right to vote and penalizing the citizens who moved recently; thus

it was a classification of a group violating the equal protection of law.

g. In the case of *Reynolds v. Dukakis*, 441 F. Supp. 446 (Mass, 1977); The Court stated that the classification of veterans conscious objectors was a clear arbitrary classification.

We conclude that Section 402(d) § (D)(i) and (ii) of the 42 U.S.C.A. discriminate against a particular group, the adopted children, as such, is a violation of the Equal Protection of the Law under the Fourteen Amendment of the Constitution of the United States and Section 7, Article II of the Constitution of Puerto Rico as in a family a legitimate child will receive Social Security Benefits while an adopted child in the same family is not entitled to receive such benefits.

Respectfully request that this case be reversed and remanded to the Secretary with an Order to grant Social Security benefits to the adopted child, Isamelina Luna González, in the account of Juan F. Luna.

Río Piedras, Puerto Rico, October 19, 1978.

RAFAEL CARRERAS VALLE, Esq.
P.O. Box 20542
Río Piedras, Puerto Rico 00928
Tel. 763-0414

Plaintiff-Appellant's Attorney

Certificate of Service by Mail

I hereby certify that on this same date, I caused the foregoing brief to be served upon opposing counsel by mail, postage prepaid, a copy to: Alberto F. Tellechea, Esquire, Asst. U.S. Attorney, P.O. Box 3391, San Juan, P.R. 00904

RAFAEL CARRERAS VALLE, Esq.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1265

JUAN F. LUNA a/b/o,
ISAMELINA LUNA GONZALEZ,
Plaintiff, Appellant,

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant, Appellee.

COFFIN, Chief Judge, and
CAMPBELL and BOWNES, Circuit Judges

Memorandum and Order

Entered October 4, 1978

After a review of the appellant's brief, the record and the district court papers, we affirm on the basis of the district court's opinion and order of March 30, 1978. Our affirmance is limited to the appellant's not satisfying the statutory requirements of 42 U.S.C. 402(d)(8)(D)(ii)(II). The district court opinion also addresses a constitutional issue which was not raised on appeal, and which we, therefore, need not address.

We add a note about appellant's brief. It never identifies the basis of the Secretary's denial, nor attempts to rebut it. The brief is confined to arguing that the appellant satisfies legal requirements not in dispute. Such a brief is of no aid to either the appellant or this court.

The judgment of the district court is hereby affirmed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

10a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL No. 77-677
SOCIAL SECURITY INSURANCE BENEFITS

JUAN F. LUNA on behalf of ISAMELINA LUNA GONZALEZ,
Plaintiff

vs.

U.S. SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant

Notice of Appeal

TO THE HONORABLE COURT:—

Notice is hereby given that JUAN F. LUNA, on behalf of ISAMELINA LUNA GONZALEZ, Plaintiff above named, hereby appeals to the United States Circuit Court of Appeal for the First Circuit, from the final judgment entered in this action on the 30th day of March, 1978, which determined in favor of defendant.

In Rio Piedras, Puerto Rico, on this 24th day of May, 1978.

RAFAEL CARRERAS VALLE
Attorney for Plaintiff
PO Box 20542
Rio Piedras Station
Rio Piedras, Puerto Rico 00924
763-0414

11a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL No. 77-677

JUAN F. LUNA A/B/O ISAMELINA LUNA GONZALEZ, *Plaintiff*

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant

Judgment

(FILED MARCH 31, 1978)

This action came before the Court, Honorable Juan R. Torruella, the issues having been considered and an opinion having been duly rendered

IT IS ORDERED AND ADJUDGED that the complaint filed in this action be and is hereby dismissed.

So ORDERED.

In San Juan, Puerto Rico, this 31st day of March 1978.

RAMON A. ALFARO
Clerk
/s/ By: NELSON PEREZ SOSA
Nelson Perez Sosa
Staff Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL No. 77-677

JUAN F. LUNA A/B/O ISAMELINA LUNA GONZALEZ, *Plaintiff*

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION AND WELFARE

Opinion and Order

(FILED MARCH 30, 1978)

The action has been brought by a wage earner entitled to disability benefits under the Social Security Act on behalf of his adopted daughter, Isamelina Luna, to obtain judicial review of the final decision of the Defendant denying the Plaintiff's claim for child's insurance benefits.

The pertinent facts in this case are not in dispute. The Plaintiff herein was found disabled by the Social Security Administration. As a result of this determination, he was entitled to disability insurance benefits beginning in February, 1965, based upon an established onset date of July 16, 1964. The child, Isamelina, natural daughter of Plaintiff's wife's, was born on July 18, 1967. She has lived with Plaintiff and his wife since birth, and was legally adopted by them on September 6, 1973.

On May 5, 1975, approximately one year and eight months subsequent to the decree of adoption, Plaintiff filed an application for child's insurance benefits under his account on behalf of the adopted child. The application was denied initially and upon reconsideration, and Plaintiff requested a hearing before an Administrative Law Judge. The Judge ruled, in September 9, 1976, that the adopted child was entitled to child's insurance benefits since the date when the

adoption became final. Thereafter, on March 15, 1977 the Appeals Council, acting *sua sponte*, reversed the hearing decision. The Appeals Council's decision constitutes the final decision of the Secretary for purposes of judicial review. 42 U.S.C. 405(g).

Section 202(d)(1) of the Social Security Act, 42 U.S.C. 402(d)(1) provides in pertinent part that:

"Every child (as defined in section 216(e) of this title) of an individual entitled to . . . disability insurance benefits . . . , if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) . . . had not attained the age of 18 . . . , and

(C) was dependent upon such individual (i) if such individual is living, at the time such application was filed. . . .

.....
shall be entitled to a child's insurance benefit . . ."

In turn, 42 U.S.C. 402(d)(8) provides, as is herein pertinent:

"In the case of—

(A) an individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B)), or

(B) an individual entitled to disability insurance benefits, or are individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits,

A child of such individual adopted after such individual became entitled to such old-age or disability insur-

ance benefits shall be deemed not to meet the requirements of cause (i) or (iii) of paragraph (1)(C) unless such child—

(C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or

(D)(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,

(ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (A), for the year immediately before the month in which such individual became entitled to old-age insurance benefits of, if such individual had a period of disability which continued until he had become entitled to old-age insurance benefits, the month in which such period of disability began, or (II) if he is an individual referred to in subparagraph (B), for the year immediately before the month in which began the period of disability of such individual which still exists at the time of adoption (.....
....., or the month in which such individual became entitled to disability insurance benefits,
.....
and

(iii) had not attained the age of 18 before he began living with such individual.

In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child has lived with such individual in the

United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of birth of such child."

In the case at bar, the child was born on July 18, 1967, a date subsequent to the commencement of the wage-earner's period of disability on July 16, 1964, and subsequent to his effective entitlement to disability insurance benefits in February, 1965. It is thus clear that the dependency requirements of Section 202(d) were not met by Isamelina, insofar as she was not living with or being supported by the wage earner in the year before he became entitled to a period of disability or disability insurance benefits.

Plaintiff does not dispute the fact that the child was born more than three years after the date when the Act's dependency requirements could have been met. Entitlement is thus clearly precluded by the terms of the statute, and it is not our function to alter that Congressional mandate. *Schroeder v. Hobby*, 222 F. 2d 713, 715 (10th Cir., 1955).

In the complaint Plaintiff raises a broad constitutional challenge to the pertinent provisions of the Social Security Act. However, nowhere does Plaintiff make an attempt to expound on this bald assertion. Considering that the Act is entitled to a "strong" presumption of constitutionality, *Mathews v. De Castro*, 429 U.S. 181, 185, and that Congressional classifications in this area are not subject to a "constitutional straitjacket", *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972), we conclude that, in the instant case, the presumption has not been rebutted. Hence, we are constrained to sustain the validity of the statute. See *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Helvering v. Davis*, 301 U.S. 619 (1937).

WHEREFORE, in view of the foregoing, the complaint filed in this case shall be and is hereby dismissed.

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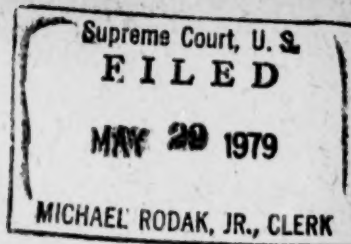
The Clerk shall enter Judgment accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 30th day of March, 1978.

/s/ JUAN R. TORRUELLA
Juan R. Torruella
U.S. DISTRICT COURT JUDGE

No. 78-1527



In the Supreme Court of the United States

OCTOBER TERM, 1978

**JUAN F. LUNA, A/B/O ISAMELINA LUNA GONZALEZ,
APPELLANT**

v.

**JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE**

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT**

MOTION TO DISMISS

**WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530**

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MOTION TO DISMISS

Appellee moves that the appeal be dismissed for want of jurisdiction. Appellant invokes this Court's jurisdiction under 28 U.S.C. 1252, but that statute applies only when a court has declared an Act of Congress unconstitutional. Appellant's complaint here is that the court of appeals did *not* declare Section 202(d)(8) of the Social Security Act, 42 U.S.C. 402(d)(8), unconstitutional. Section 1252 thus does not provide jurisdiction. The papers whereon the appeal is taken should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

Certiorari should be denied. Section 202(d)(8), the object of appellant's challenge, provides that children adopted after their adoptive parent becomes eligible for disability usually are not entitled to children's benefits.

Children born to a wage-earner after the onset of disability are eligible for benefits. As the court of appeals pointed out, however, appellant did not properly preserve any constitutional challenge. His argument on appeal was limited to questions of statutory construction (J.S. App. 9a); he did not raise any constitutional argument until filing a petition for rehearing, and the court of appeals then refused to rule on the point (*id.* at 4a-5a). In these circumstances, the constitutional challenge cannot be raised here. *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

At all events, appellant's constitutional argument fails under the standard of *Weinberger v. Salfi*, 422 U.S. 749 (1975). The disqualification of after-adopted children is a prophylactic measure that prevents a potential abuse: adoption for the purpose of creating an entitlement to benefits. The Court held in *Salfi* that such rules are constitutional so long as Congress rationally could have concluded that a prophylactic rule is necessary to guard against abuse. The statute in question here is rational. There is an inevitable potential for abuse in the practice of adopting children after the onset of disability. The statute does not prevent such adoptions; it simply provides that they will not be subsidized.* Cf. *Califano v. Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 7-8. The same

*After adopted children are eligible for benefits if they fall into one of three categories that Congress thought posed the least potential for abuse. See 42 U.S.C. 402(d)(8) (eligible children include stepchildren; children living with and supported by the disabled beneficiary for a year before the period of disability begins; grandchildren adopted by a grandparent with whom they lived).

constitutional issue was presented earlier this Term, and the Court denied review. *Williams v. Califano*, cert. denied, No. 77-1533 (Oct. 2, 1978). There is no greater reason to grant review here.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

MAY 1979

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